Scotland's Alcohol Minimum Pricing

Article | No 39

EUROPEAN FUTURES

Scotland's Alcohol Minimum Pricing: First Encounter with EU Law

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Permalink: http://www.europeanfutures.ed.ac.uk/article-1774

Publication: 5 November 2015

Article text:

*In this special extended article, **Arianna Andreangeli** analyses the opinion of the Advocate General in the preliminary reference case on the compatibility of Scotland's minimum pricing with EU internal market rules. The central question, she writes, is whether the measures meet a public policy objective in an appropriate and proportional way that justifies the limitations on trade. She argues that, while the EU court will give guidance on how to apply EU law, it will ultimately remain for the national court to decide, balancing the evidence, public policy and the will of the legislature on one side, and the effective application of EU law on the other.*

Minimum Pricing and EU Law

Controversial legislation always keeps the attention of commentators, but there inevitably comes a point when the focus of debate shifts to other 'more attractive' issues. Yet, this was not the case for the ongoing legal and public policy saga of the measures adopted by the Scottish Parliament in 2012 to introduce a system for setting a minimum price-per-unit (MPU) for alcoholic beverages.

Since its passage, the Alcohol Minimum Pricing (Scotland) Act 2012 has been the subject of heated debate. In addition, the fact that implementation was suspended, in order to receive a preliminary ruling from the Court of Justice of the European Union (CJEU) on the compatibility of the Act with the EU treaties, has only added to the suspense.

While it cannot be said that the wait is over, the opinion of Advocate General (AG) Yves Bot, delivered on 4 September 2015, certainly represents a milestone in this long-running story. The Advocates General advise the Court on the cases before it and their written opinions, delivered in open court, traditionally have considerable weight in the final decision.

The opinion will, no doubt, be subject to more in-depth and equally heated discussions in the days and months to come. Indeed, the Scottish Government has already made its (cautiously positive) voice known about the Advocate General's assessment. In these early weeks, several points already catch the attention, going beyond free trade and competition rules.

Assessing the Restrictions on Trade

The first question concerns whether the nature of the minimum price per unit mechanism is a restriction on trade among the EU Member States. The Advocate General did take on (see below) the issue of whether MPU represents a measure having equivalent effect to a quantitative restriction (MEQR), which would potentially contravene EU rules on the free movement of goods.

However, it is of great interest that he also considered whether MPU could be exempted from the application of the Article 34 of the Treaty on the Functioning of the European Union (TFEU) prohibition on the grounds of being a mere 'selling arrangement'. Selling arrangements relate to the sale of certain goods (such as their presentation or composition) which are both applicable to all traders within a Member State and affect the marketing of the goods in the same way, regardless of their origin within the internal market.

In its earlier *Van Tiggele* judgement, the CJEU took the view that any measures resulting in a trader established in a different Member State being unable to use a competitive advantage (such as that resulting from lower production costs and in turn from the ability to offer goods at lower prices than domestic ones) should be regarded as an MEQR, even where the measure at issue had a general application.

Nevertheless, in its *Keck* ruling, the Court made clear that the MEQR prohibition would not extend to rules of general application that merely concerned the marketing of certain products which did not discriminate against products originating in other Member States to the benefit of nationally sourced goods.

In his analysis, AG Bot addressed both questions and, perhaps not surprisingly, found that the MPU legislation should be characterised as an MEQR. He observed that the obligations enshrined in the 2012 Act had the effect of 'cancelling out' any price advantage stemming from lower costs. MPU would have the effect of making it more difficult for cheaper foreign goods to access the Scottish market (which could have conceivably relied on that advantage to make themselves more attractive) and was therefore contrary to Article 34 TFEU (see Paragraphs 47-60).

On the other question of whether these measures could be regarded as a selling arrangement – and consequently beyond the scope of Article 34, subject to the requirement of being non-discriminatory – the Advocate General accepted that the MPU rules could be considered as rules affecting the marketing of certain products, as laid down in *Keck* (Paras 61-63).

However, he concluded that, in as much as these measures result in cancelling out any lower cost advantage that a non-Scottish trader could have reaped, they have a discriminatory impact vis-à-vis non-domestic goods. As such, they could not benefit from the 'safe harbour' recognised by the *Keck* ruling and are *prima facie* incompatible with free movement rules (Paras 64-69).

Of course, the label of MEQR is not the end of the line for the legislation. MPU can still potentially benefit from the exemptions provided by Article 36 TFEU, if it can be shown that it meets requirements of appropriateness and necessity vis-à-vis the attainment of public policy, such as the protection of human health.

This is perhaps the more interesting part of the opinion, as well as the one which is likely to prove more controversial. The opinion touches upon issues pertaining to the interpretation and application of the rules on free movement. However, it goes further, considering general questions on the EU's broader judicial structure and, in particular, the relationship between the Court of Justice and domestic courts in this context.

Impact on the Single Market and Alternatives

We can now turn to the opinion's treatment of free movement and single market issues. AG Bot accepted that the MPU rules could be appropriate to the pursuit of public interest goals. This would be determined by the domestic courts, assessing the evidence to hand and keeping in mind the scope of discretion enjoyed by the Member States in pursuing objectives of general interest.

In this respect, it should be emphasised that the opinion reiterates the existing broad margin of appreciation granted to Member States to decide what types of measures to adopt to pursue public health objectives. This leeway includes setting the levels of health protection which they consider to be commensurate with the needs of the population (Paras 121-135).

This perspective is not at all surprising, particularly in the light of Article 168(10) TFEU which, consistent with the principle of subsidiarity, recognises the 'sovereignty' of Member States over the design and regulation of healthcare provision. This is particularly the case when regulation is state-funded and it reaffirms the correspondingly limited competence of the EU in these matters (see *Watts*, especially Paras 84 and 104-106).

Perhaps more importantly (especially for the Scottish Government), the Advocate General expressed the view that the MPU rules could not only be regarded as 'appropriate' for the aims they pursued, but they also represented a 'systematic' and 'consistent' way of attaining goals of high levels of public health in Scotland (Paras 128 and 135).

This aspect of the opinion can be viewed as a cautious but clear endorsement of a central health science and policy argument made in favour of MPU – its ability to reduce consumption of cheaper alcoholic beverages, which tend to be purchased by individuals in poorer and more disadvantaged social groups.

Assessing the necessity of MPU is, by contrast, far more challenging, both for the Scottish Government and for the referring court, which will have to do much of the work when it comes to conducting the analysis of whether the 2012 Act complies with the EU treaties (Paras 136ff).

The Advocate General confirmed that MPU had a clear 'deterrent effect' and could result in lost sales, especially for beverages at the 'lowest end' of the market (Para 150). However, he suggested that the central question should be the extent to which alternatives exist to the MPU mechanism which are capable of attaining the same type and level of public policy gains.

These alternatives could also be less restrictive on the free movement of goods than MPU (Paras 149, 152). On that basis, he proposed that a clear alternative to the legislative imposition of minimum prices was a generalised increase in indirect taxation on the sale of alcoholic beverages.

AG Bot recognised that tax hikes were undoubtedly 'easier to fit' within the framework of principles governing the internal market, on account of being generally applicable as well as not restricting the freedom to compete on price. He highlighted the fact that a generalised increased in indirect taxation had been introduced, for instance, in tobacco sales. Along with other measures, such as those affecting product appearance, this increase was designed to reduce consumption (Para 140).

The opinion also noted that the impact of indirect taxation could be more effective, since it had the potential to influence consumption not only among lower-income consumers, but also among middle-income consumers. The result would be a reduction in health harm across the board – not just in the 'target social layer'.

On that basis, the Advocate General took the view that it remains open to Member States to decide whether to introduce a minimum price-per-unit framework for the purposes of improving public health. However, on account of the restrictive impact of such an approach on the free movement of goods, they are under an obligation to demonstrate that these measures have 'additional advantages or fewer disadvantages' than other, *prima facie*, equally appropriate measures.

Importantly, the Advocate General made clear that an MPU regime could be not put in place over alternative measures on the basis that they might yield additional benefits for the public health 'at large' (Paras 147-152).

Appropriateness and Proportionality of MPU

As the preceding analysis suggests, AG Bot adopted a rather conservative and sceptical view of minimum pricing legislation. Following from established EU case law, unsurprisingly, he was very suspicious of MPU and instead seemed to favour measures of a fiscal nature as means of achieving public policy goals.

However, it is certainly possible that a more benevolent view of the Scottish Parliament's MPU legislation could emerge, especially when the public policy rationale is taken into account. In this respect, it is important to emphasise that AG Bot's view was that the MPU rules constituted 'appropriate' means for securing high levels of public health.

Nevertheless, the evaluation of their proportionality vis-à-vis alternative measures, including those of a fiscal nature, appeared immediately more problematic. On the one hand, by its very nature the MPU legislation affects directly on a fundamental tenet of the internal market – the freedom to set prices.

On the other, alternatives to MPU – such as the possibility of introducing a generalised indirect tax increase on alcohol – appeared capable of benefiting not

just the target groups but society as a whole, *prima facie* contributing to the improvement public health without interfering with single market rules.

Put a different way, the Advocate General seemed to grapple with a trade-off between achieving a more discrete objective, in terms of the scope of those affected, and pursuing a more generalised public policy goal. On this point, he appeared to suggest that fiscal measures have an advantage over MPU, on account of its ostensibly wider benefit.

However, as the health and policy-related evidence presented by Scottish Ministers shows, the setting of minimum prices per unit of alcohol represents an effective tool for addressing the consequences arising from hazardous consumption of cheap alcohol, particularly among poorer segments of the population. It is worth remembering that the Advocate General himself recognised that Member States enjoy wide latitude in public health matters, including in setting standards of protection that they regard as 'appropriate' to the needs of the population (eg Paras 81-87).

Justifying the Restrictions on Trade

Against this backdrop, we may wonder to what extent the wide discretion domestic authorities enjoy in the area of public health should be open to being second-guessed by the EU. Provided that the requirements of appropriateness, necessity and proportionality of the restrictions on trade are satisfied, surely Scotland remains entitled to take measures designed to improve the health of particular targeted social groups, even where this might not help the public as a whole?

Protecting all or part of the public health is the right of the Member States. Nevertheless, its exercise cannot unduly hamper the functioning of the internal market. Therein lies the crux of the matter when it comes to Scottish MPU rules. The restrictions they bring on the free movement of goods should be no less severe than comparable policy alternatives which achieve the same public policy objectives.

Accordingly, as mentioned in the opinion, the evaluation of the proportionality of the MPU rules – which must take into account alternative policy tools, such as measures of a fiscal nature – will prove decisive. Fiscal measures are of general application and do not impinge upon the freedom of competition among traders active in the market for alcoholic beverages. MPU limits the scope of a central single market tenet – the freedom to set prices. This difference represents a potential stumbling block for the legislation.

In EU law, it is widely accepted that any constraint, whether legislative or contractual, on the freedom to set prices is a very serious infringement of competition rules. In order for MPU to be exempted from these rules, it must satisfy certain criteria, for instance those in Article 101(3) TFEU (eg *M6 and others v Commission*). Such a case is by no means impossible. The argument would need to be made that the market restrictions are necessary to secure public gains of a different (ie non-economic) nature.

In recent years, calls have been made to reclassify 'resale price maintenance' – the contractual equivalent to statutory minimum pricing rules – from a 'by object' infringement to a 'by effect' breach. It has been suggested that imposing a 'compulsory minimum profit margin' could lead to increased inter-brand competition. It has also been said that it could be justified by the nature of the goods or services affected, since it could conceivably 'finance' modalities of trade that were peculiar to particular industries.

In the past, similar arguments were made (without much success) about the sale of newspapers and magazines. It was suggested that this obligatory margin was the only way to maintain the 'sell or return' trade of these goods. Consequently, it was necessary for protecting the viability and the overall good management of that industry (eg *SA Binon* et al, and *Fachverband*).

The Case for 'Quality' as Competition

In light of the above, the question arises whether a similar argument could be made to justify the Scottish MPU rules. The aim here would be to demonstrate that MPU is appropriate for securing high levels of public health, even if its proportionality remains questionable after taking into account Member State discretion.

Given the likely benefits, will the restrictions on trade be outweighed by their positive impact on health, keeping in mind alternatives which could achieve the same results? These assessments are bound to involve complex appraisals of fact, which fall within the remit of domestic courts. Price competition is so important to the internal market that it cannot be completely eliminated, either horizontally or vertically.

Nevertheless, provided that the criteria are met and the principles observed, the internal market may yield to the demands of public policy. In the EU treaties, free movement principles can be overridden, as outlined in Article 36 and Article 101(3) TFEU, within the limits of necessity, proportionality and appropriateness.

The Court of Justice has itself recognised that promoting competition on other grounds, such as quality, may be allowed at the expense of rivalry based on price (eg, *mutatis mutandis*, *Metro v Commission*). It has also acknowledged that restrictions on the freedom to trade and compete aimed at securing public interest goals may fall outside the scope of Article 101(1), where they fulfil strict limits of necessity and \ proportionality vis-à-vis the goals pursued.

Such exemptions have included the 'sound administration of justice' (*Wouters*), the protection of 'the health of athletes' and 'fair play' in sport (*Meca Medina*). Could the protection of public health not be next in line as a justification for market restrictions in order to pursue public interest objectives?

With this case law in mind, as AG Bot recognised, introducing floor prices for public policy reasons represents an appropriate tool for attaining high levels of health protection across the internal market (see *inter alia* the studies published by the Sheffield University Alcohol Research Group).

Furthermore, the MPU rules allow minimum prices to differ according to the alcoholic strength of the type of products. This could encourage competition based on the 'quality' of specific drinks. In that sense, it could make drinks within different categories reciprocally substitutable to consumers.

The ultimate question for the domestic court will be to what extent, on the strength of the evidence before it, the public health benefits of MPU outweigh the loss of competition from setting minimum prices. The assessment of 'loss' should take into account not just competition in terms of prices, but also the 'quality' of products. If the MPU mechanism is likely to result in a widening of the range of substitutes vis-à-vis the goods affected, the loss of rivalry could well be more limited, therefore further strengthening the position of the legislation.

National Court to Evaluate the Evidence

Beyond the free movement of goods, the Advocate General's opinion raises important questions on the nature of EU competences in the fields of agriculture and public health. It also highlights a number of issues relating to the relationship between domestic courts and the CJEU when the latter hands down the preliminary ruling and the former are called upon to apply it to the dispute from which the reference originated.

The opinion considers the extent to which MPU would be compatible with the Common Agricultural Policy (CAP) rules governing wine sales (Paras 27-46). The Court of Session had expressly asked the Court of Justice to rule on the compatibility of the MPU legislation with the EU rules in this area. In particular, it had asked whether setting floor prices for wine would contravene the general rule in an EU regulation that wine pricing be left to the market.

AG Bot dispensed with these questions relatively quickly. He noted that the Treaty of Lisbon had moved the CAP from an exclusive to a shared competence and that trade in agricultural goods such as wine was no longer a 'market free zone' (Paras 36-38). He expressed the view that Member States could enact rules to govern the functioning of these markets, such as MPU, provided that such measures were appropriate and necessary to the objectives pursued (Para 41-46).

More notably, the opinion highlights once again the delicate balance in Article 267 TFEU – the cooperation between the Court of Justice and domestic courts. To what extent should the referring court assess the national rules before it in light of the EU treaties? On what evidence should it rely?

These questions are complicated by two factors – the legislative nature of MPU and the fact that not all of its provisions were directly applicable when the challenge was brought, as implementing measures had yet to be adopted at ministerial level.

The Advocate General acknowledged that the national court should exercise caution in examining the MPU measures at issue once the preliminary ruling is handed down. In his view, it is for the Member States to determine the 'degree of protection… to afford to public health and… the way in which [it]… is to be

achieved'. National courts should therefore employ a 'certain relaxation of control', to avoid 'second-guessing' the national legislature (Paras 81-84).

However, the opinion emphasises that this discretion should not render the principles in the EU treaties 'devoid of substance'. On this basis, AG Bot suggests that, in line with the principle of national autonomy, the national court should assess the suitability and proportionality of the measures in question (Paras 84-86).

In this assessment, all evidence available – at the time the measure was adopted or subsequently – should be taken into account. Since the 'numerous social parameters' in public health could change, the assessment should be dynamic in nature, both in outlook and scope. It should, therefore, include all evidentiary material available to the national court at the time of the case (Paras 101-108).

According to the Advocate General, the review should only be limited by the *inter partes* principle – the right of all parties to comment on and to disprove the arguments arising from the evidence – and any other national rules governing the production of evidence, subject to equivalence and effectiveness (Para 109).

National Courts and the EU Courts

With all this in mind, the opinion represents a strong restatement of the cooperative and egalitarian nature of the relationship between domestic courts and the Court of Justice in the preliminary reference procedure. While the CJEU provides guidance on the interpretation of the EU treaties, only the national court is the judge of the dispute.

The national court relies on the principle of national autonomy and must abide by the procedural rules that the relevant national system provides. However, at the same time, the national judge must resolve the matter in dispute in a way which ensures that EU law is given 'full effect'.

For this purpose, the national court should engage the questions at hand in the fullness of the evidence available. Without second-guessing the legislature, it must conduct a scrupulous assessment of that evidence in light of the principles in the EU treaties and the CJEU's guidance.

The wait continues until the Court of Justice hands down its ruling. All the same, the Advocate General's opinion represents a milestone in the story of Scotland's MPU.

The preliminary reference itself did not request guidance on the application of the legislation to future sales' contracts. It could be claimed before the domestic courts that these contracts were anti-competitive and thus void, on account of their compliance with MPU in determining the price of alcoholic beverages. Could a 'justification' for them be found in Article 101 TFEU?

The ability to invoke obligations from national legislation to avoid the application of competition rules has become very limited (eg *Consorzio Italiano Fiammiferi v*

AGCM). However, following from the repeated calls to reconsider the current legal approach to resale price maintenance, it could be legitimately asked whether the outcome of the proceedings before the Court of Session may have a bearing on the future of this debate.

The opinion gives some food for thought on the extent to which the attainment of high levels of public health may provide a justification for restricting the freedom to set prices in markets in harmful goods such as alcohol. For contributions to this debate, see articles by Gulati and Elzinga and Mills.

The setting of minimum prices in agreements among undertakings has been regarded as a 'by object' restriction on competition. This has been the case even when it was *prima facie* aimed at achieving public policy objectives, and thus difficult to fit within the four-pronged exception laid down in Article 101(3) TFEU.

Given the cautious but potentially promising endorsement of MPU as an 'appropriate means' of securing high levels of public health, we may wonder whether the time is right to look again at resale price maintenance motivated by public policy objectives (such as past experiments in book sales, as *Fachverband* reminds us).

The Advocate General's assessment would indicate that any such arrangement would have to clear high hurdles to meet the 'negative conditions' requirements in Article 101(3). Nevertheless, he seems to suggest that is not impossible for undertakings to rely on Article 101(3) to avoid nullification of agreements containing minimum pricing, even where it is mandated by domestic legislation.

Article 101(3) may not be the only avenue through which resale price maintenance clauses justified through public policy can avoid infringing EU competition rules. EU case law in recent years seems to indicate a trend toward a more 'in-context' approach to Article 101(1) TFEU in cases concerning restrictions on the freedom to trade and to compete where the measures are designed to achieve public policy objectives.

Judgements such as *Meca Medina* and *Wouters*, with their emphasis on the requirements of appropriateness and indispensability, may well provide the space within which the benefits arising from resale price maintenance aimed at securing public policy goals can be assessed against the loss of competition. For a more general discussion of these issues, see an article by Jones.

Outlook for Scotland's MPU

The legal questions surrounding MPU are of course only part of the picture. The 'politics' around MPU will prove very complicating for all of the stakeholders involved.

On one side, the Scottish Government has overall reacted positively to the opinion. It has described it as an in-principle endorsement of MPU and a confirmation that, provided that the tests in Article 36 TFEU are met, it is the 'right measure for Scotland to reduce the harm that cheap, high-strength alcohol causes our

communities.' The opinion did confirm that MPU could reduce consumption of cheap alcohol, especially in more deprived social groups (Paras 127-135).

On the other side, the Scotch Whisky Association did not give much away, apart from a restatement of its commitment to fight MPU to the very end.

The final decision rests with the Court of Session. As mentioned above, the very nature of the preliminary reference procedure means that the domestic judges will apply the tests of proportionality and appropriateness to the MPU rules.

The opinion's emphasis on the role of the domestic judiciary in implementing EU law is not surprising. The proportionality and appropriateness assessments of MPU – part of which are not yet fully applicable – will prove inevitably complex for the judges at the Court of Session.

Domestic courts apply EU law daily in the administration of justice. In this case, the Court of Session will do so while reviewing an act of the Scottish Parliament, likely with guidance calling on it to review all the evidence before it. Balancing the demands of the effectiveness of EU law and respecting the wishes of the Scottish Parliament is no doubt a very arduous task.

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